***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

77-7238

8/22

# UNITED STATES COURT OF APPEALS

*for the*

# SECOND CIRCUIT

B

P/S

FRANK SANTORA and JOHN S. IANNONE,

Plaintiffs-Appellants,

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; and HARRISON J. GOLDIN, COMPTROLLER,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

## BRIEF FOR PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS

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FRANK SANTORA & JOHN S. IANNONE,

Plaintiffs-Appellants

-against-

THE CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, PERSONNEL DIRECTOR AND CHAIRMAN, DEPARTMENT OF PERSONNEL, CIVIL SERVICE COMMISSION; ANTHONY R. AMERUSO, COMMISSIONER OF HIGHWAYS; & HARRISON J. GOLDIN, COMPTROLLER,

Defendant-Appellees.

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## THE APPEAL

Appellants appeal from the order of Judge Henry F. Werker in the United States District Court, Southern District of New York, dated April 4, 1977, which dismissed appellants' complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure on the ground that the action was time barred by the controlling statutes of limitations. Appellants' complaint alleged they had both been demoted from their tenured public employment position without a hearing or any due process procedure whatever in violation of their rights under the Fifth and Fourteenth Amendments of the United States Constitution. Jurisdiction for the Court to hear their claims pursuant to 42 U.S.C. §1981 and §1983 (1970) was alleged under 28 U.S.C. §§ 1343 (3) and 1343 (4); and pursuant to the constitutional claim provisions of 28 U.S.C. § 1331 (a) (1970).

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Can a person, deprived by a municipality of constitutional rights guaranteed by the Fourteenth Amendment, obtain relief in a federal court directly on the basis of the Fourteenth Amendment and the constitutional claims provisions of 28 U.S.C. 1331 (a) (1970)?

## STATEMENT OF THE CASE

Appellants were public employees summarily demoted from tenured public employment positions without any due process procedures whatever. Their complaint in the Court below, filed outside of the three year Statute of Limitations period was dismissed as time barred in that it did not present a constitutionally based cause of action against a municipality, invokable under the constitutional claims provisions of 28 U.S.C. 1331 (a) (1970), which would entitle them to a longer Statute of Limitations period. The question presented for review, whether the Fourteenth Amendment by itself sustains a cause of action against a municipality for its violation was previously addressed by this Court en banc but not resolved in Brualt v. Town of Milton, 527 F. 2d 730 (2d Cir. 1975).

## The Proceedings Below

The defendants filed no answer to the District Court complaint but instead moved for dismissal of the action pursuant to Rule 12 of the Federal Rules of Civil Procedure on the grounds the action was time barred by the Statute of Limitations and the doctrime of Res judicata [A 13]. The District Court [Werker, J.] declared the defense of Res judicata to be seemingly "meritless" [A 16, 22] but found the action was time barred because of its filing after the three year statute of limitations had expired.

## STATEMENT OF THE FACTS

Appellants are long time employees of the City of New York, working in the municipal civil service in the job classification Foreman, Asphalt Worker, Highway Department [A-6]. In February 1969, the appellee Civil Service Commission announced a promotional examination for the higher classification of District Foreman, Highway Maintenance. The appellants were permitted to take the examination on May 15, 1969 but almost a year later on May 5, 1970 were notified their examinations had not been rated because they were not in an eligible title that qualified them to take the examination for District Foreman[A 7].

Thereafter, the appellee Civil Service Commission, pursuant to a state court order (with which litigation appellants had no contact whatever), graded the examinations of plaintiffs and others similarly situated and added their names to those who passed.

In June 1971, plaintiffs received confirmation of their passage of the examination and their eligibility for promotion.

On September 18, 1971 both appellants were promoted to the higher position of District Foreman from the eligible list [A-7]. Appellants probationary period in their new position expired March 17, 1972 at which time they acquired tenure and the concomitant right not to be removed without charges and a hearing [A-7].

In November 1972, the Appellants were notified that the Civil Service Commission had declared them ineligible for their promotion to District Foreman [A-8] and on December 9, 1972 (fourteen months and nine days after their appointment) they were summarily demoted and reassigned to their former positions of Foreman of Asphalt Workers [A-8].

Appellants subsequently learned their promotion had been disputed by a rival union, District Council 37, and the dispute had been resolved against them with no notification to them nor an extension of the opportunity to intervene or argue on their own behalf [A-8].

Appellants alleged in their complaint that their summary demotion from tenured public employment positions denied them their constitutional rights guaranteed by the Fifth and Fourteenth Amendments [A4,10] and further that the action of the defendants in denying the appellants' eligibility for promotion on the basis of their lack of membership in District Council 37 amounted to an arbitrary and unreasonable discrimination violative of their constitutional rights [A 10].

## ARGUMENT

### POINT I

### THE DISTRICT COURT ERRED IN APPLYING A THREE YEAR STATUTE OF LIMITATIONS TO TIME BAR APPELLANTS' COMPLAINT

Appellants in the court below complained they had been demoted from tenured, public employment positions without any procedural due process procedures whatever [A-9 - 10]. As such, they were unlawfully deprived of rights guaranteed them under the Fifth and Fourteenth Amendments of the United States Constitution. Board of Regents v. Roth, 408 U.S. 564 (1971) and Perry v. Sinderman, 408 U.S. 593 (1971).

One branch of appellants' complaint invoked 42 U.S.C. §1983 (1970) with jurisdiction in the district court grounded upon 28 U.S.C. § 1343 (3) and § 1343 (4) (1970). The court below in looking to apply controlling state statute of limitations pursuant to the mandate of Johnson v. Railway Express Agency, Inc. 421 U.S. 454, 462 (1975) found it was the "settled" law of this circuit that the applicable period of limitations was the three year statute of limitations found in section 214 (2) of the New York Civil Practice Law And Rules (CPLR) (McKinney), citing Romer v. Leary 425 F. 2d 186, 187 (2d Cir. 1970) and other cases. [A-17; fn. 3, A-24].

Although there is a line of second circuit cases beginning with Swan v. Board of Education, 319 F. 2d 56, 60 (2d Cir. 1963) and continuing down through Kaiser v. Kahn, 510 F. 2d 282, 284 (2d Cir. 1974) which apply New York's CPLR § 214 (2) three year statute of limitations to civil rights actions brought under 42 U.S.C. § 1983, plaintiffs-appellants argued the six year

statute of limitations contained in CPLR § 213 (1) applied to their causes of action which were grounded on the United States Constitution. The court below rejected this argument insofar as federal jurisdiction under 42 U.S.C. § 1983 was concerned but conceded that a six year statute would apply if the plaintiffs-appellants could demonstrate a valid cause of action grounded directly on the Fourteenth Amendment and the constitutional claims provision of 28 U.S.C. § 1331 (a) (1970).

In determining whether to apply the three year statute of limitations contained in CPLR 214 (2),

> "The following actions must be commenced within three years:
> 1...
> 2. An action to recover upon a liability, penalty or forfeiture created or imposed by statute..."

or the omnibus six year statute contained in CPLR 213 (1)

> "The following actions must be commenced within six years:
> 1. An action for which no limitation is specifically prescribed by law;"

The law of New York is clear that suits vindicating constitutional rights fall within the six year statute of CPLR 213 (1). The controlling law on this precise question is summarized in 1. Weinstein-Korn-Miller, New York Civil Practice §214.04, p. 2-281:

> "The test of a liability created by statute, simply stated, is whether the liability is one which did not exist at common law, or would not exist but for a statute. This test may be subject to the qualification that the statute pursuant to which the action is brought must be the one which

> creates the new cause of action. Where the statute merely gives the particular plaintiff (a taxpayer) a right of action based on conduct which is elsewhere declared illegal (a lease made by the town without public hearing and referendum in violation of the Town Law), it has been held that the liability was not one created by statute; the proper test was stated to be whether "the liability is 'a governmental statutory denouncement of a human action heretofore undenounced.'"

The leading case declaring that actions to enforce constitutional rights are not subject to the statute of limitations period for actions to recover upon a liability created by statute is In Re Clark v. Water Commissioners, 148 N.Y. 1 (1895). In Clark, a village took property without paying compensation. The property owner did not sue until after the expiration of the period provided by law for challenging condemnation proceedings. The village invoked the predecessor of CPLR §214 (2) which contained a six year period of limitations and the property owner invoked the predecessor of CPLR §213 (1), then a ten year period. The court applied the ten year statute, holding that the liability to pay for land taken by condemnation was constitutional not statutory and held that statutes establishing a procedure to enforce a liability were not what was meant by the word "statute" in the predecessor to CPLR §214 (2) which contained a shorter period of limitations for actions to recover upon a liability created by statute.

The New York courts have continued to make the fundamental distinction between substantive and procedural liability in determining whether to apply the shorter or longer statute of limitations and in particular the content of CPLR §214 (2). City of Buffalo v. Maggio. 21 N.Y. 2d 1017 (1968); People of The State of New York v. Duggan, 30 App. Div. 2d 736 (3d Dept. 1968); Bevelander v. Town of Islip, 10 App. Div. 2d 170 (2d Dept. 1960).

Plaintiffs-appellants are suing to vindicate rights guaranteed by the Fourteenth Amendment of the United States Constitution, Board of Regents v. Roth, supra, and Perry v. Sinderman, supra, not statutory rights and therefore their complaint is not time barred by the shorter three year statute of limitations of CPLR § 214 (2).

The court below did not address the issue whether plaintiffs' section 1983 claim could be asserted against a municipal corporation and its agents. See Monroe v. Pape 365 U.S. 167 (1961) and Fine v. City of New York, 529 F.2d 70,75 (2d Cir.1975).

The decisive issue in the decision below and the issue presented for review on this appeal was whether plaintiffs-appellants could claim the benefit of the six year statute of limitations, contained in CPLR §213 (1) and applicable to constitutional causes of action, by directly grounding their claim on the Fourteenth Amendment and the constitutional claims provision of 28 U.S.C. §1331 (a) (1970) which reads:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests or costs and arises under the Constitution, laws, or treaties of the United States."

The court below preliminarily found that the complaint was "neither frivolous nor interposed for the sole purpose of obtaining federal jurisdiction" [A-20] and that the jurisdictional threshhold of $10,000 in damages had been met [fn.7, A-25]. Squarely faced with the question whether a direct Fourteenth Amendment cause of action could be asserted against a municipality, an issue already faced by this Court on other occasions but not resolved [see Brualt v. Town of Milton, 527 F. 2d 730 (2d Cir. 1975); Fine v. City of New York, 529 F 2d 70 (2d Cir. 1975)], the court below declared it was persuaded that this Court would not hold that Fourteenth Amendment causes of action can lie against municipalities [A-19-20].

In Bivens v. Six Unknown Named Agents of The Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court directly confronted the question whether a cause of action for damages could be posited directly upon the constitution, specifically, the Fourth Amendment. The resulting opinion embodied a constitutional principle that transcended the relief granted (damages against federal officials for an unlawful, warrantless search of a private home). The Bivens majority clearly stated that the fourth amendment creates of its own constitutional force rights in individuals which when invaded "and a federal

statute provides for a general right to sue for such invasion." then "federal courts may use any available remedy to make good the wrong done." 403 U.S. at 39[illegible]

The Bivens' opinion contained one caveat, namely, that the case before it involved "no special factors counseling hesitation in the absence of affirmative action by congress." 403 U.S. at 396. The court below seized on that caution to read into the Bivens' doctrine an exception for municipalities based upon the congressional enforcement specification contained in section 5 of the Fourteenth Amendment and the exclusion of municipalities from the predecessor of section 1983, The Act of April 20, 1871 [A 20-22].

A quick rebuttal to the exclusion of municipalities from the ambit of Bivens is found in City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507 (1973), decided two years after Bivens. In Bruno, the Supreme Court, while declaring that a Fourteenth Amendment claim could not be made against a municipality pursuant to 42 U.S.C. §1983 and 28 U.S.C. § 1343 (3), remanded the case for a determination whether the $10,000 damage threshhold could be met for purposes of grounding the Fourteenth Amendment claim on 28 U.S.C. §1331 (a). 412 U.S. at 514 and concurring opinions at 412 U.S. 516.

Furthermore, the Bivens opinion indicated an explicit congressional declaration would be necessary before the Court would find that Congress intended to preclude a damage remedy for constitutional violations 403 U.S. at 397. See also Kent v. Dulles, 357 U.S. 116, 129-30 (1958) and Hart and Wechsler, The Federal Courts and The Federal System

336 (2d ed. 1973). The presumption is strong that the federal courts are open to redress violations of constitutional rights unless it is crystal clear that congress intended to close the courthouse doors. In Bivens, the court also rejected the argument that where Congress provided specific civil rights remedies the courts were precluded from creating additional remedies under the Constitution. In the opinion of this Court in the Bivens case, the dismissal of the complaint was affirmed on the grounds that Congress had been active in providing statutory remedies for particular constitutional violations and that therefore it would "not be appropriate for this court to fill the hiatus left in this area by Congress." 409 F. 2d 718, 724-25 (2d. Cir. 1969). In reversing, the Bivens court rejected the argument for preemption by Congressional enactment and, by extension, the similar argument by the court below in this case.

The court below fashioned a municipal exclusion from the Bivens holding by reading section 5 of the Fourteenth Amendment, namely,

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"

as a constitutional sanction for a congressional preemption of the power to effect remedies for violations of the Fourteenth Amendment. This preemptive power when read together with the legislative history leading to the enactment of the Act of 1971, section 1983's predecessor, the court below reasoned, constitutes a clear restraint upon the judicial power to establish a remedy in damages for direct municipal invasion of constitutional rights.

Such a reading of section 5 of the Fourteenth Amendment turns ambiguous language into a contradiction of Article III of the Constitution which declares "the judicial power shall extend to all cases... arising under this Constitution." Furthermore, Congress did create a remedy for violations of the Fourteenth Amendment, namely, 28 U.S.C. §1331 (a) (1970). It remains to be determined whether section 1983 must be read to exclude municipalities from the arbit of section 1331 (a).

Certainly the legislative history of the 1871 Civil Rights Act, the predecessor of section 1983, does not support an argument for congressional preclusion of the courts from creating any constitutional remedy in damages against a municipality or "a special factor counselling hesitation." 403 U.S. at 396. The 1871 Act was directed primarily against the rising tide of Ku Klux Klan and other private group violence directed at blacks and Republicans. Section 1983 imposed liability upon persons acting under color of state law. The Sherman Amendment, which was passed in the Senate but rejected by the House, would have made every municipality, county and parish strictly liable in damages to victims of organized violence perpetrated within its boundaries. See Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 945-951 (1976). The rejection of the Sherman Amendment in 1871 and the exclusion of municipalities from the ambit of the 1871 Act and predecessor of section 1983, has little relevance to the Bivens remedy.

Furthermore, the Sherman Amendment imposing liability on municipalities passed the Senate and was rejected in the House. Such ambivalent congressional action can hardly provide a clear congressional mandate to exclude municipalities from liability for direct violations of Fourteenth Amendment rights by its agents and officers.

In discussing the historical relationship of 28 U.S.C. §1331 to 42 U.S.C. §1983 and its companion 28 U.S.C. §1343 (3), the Supreme Court declared that section 1331 was a subsequent expansion of the trend, initiated by the enactment of section 1983, increasing national authority over matters previously left to the States. Lynch v. Household Finance Corp. 405 U.S. 538, 548 (1972). If section 1331 is to be read as an expansion of section 1983, then section 1983 cannot be read forward in time as a restriction upon a subsequently enacted measure. In Lynch, the court refused to read section 1331 as a repeal by implication of section 1983. 405 U.S. at 549. The converse is also true that section 1983 cannot be read as a repeal by implication of the broad ambit of section 1331.

## POINT II

## OTHER FEDERAL JURISDICTIONS HAVE UPHELD FOURTEENTH AMENDMENT CAUSES OF ACTION FOR DAMAGES AGAINST MUNICIPALITIES

At least three federal circuits have entertained suits against municipalities under the Fourteenth Amendment for damages. In Skehan v. Board of Trustees, 501 F. 2d 31, 44 (3d Cir. 1974); vac. on other grounds 421 U.S. 983 (1975), the Third Circuit found jurisdiction would lie for a dismissal of a public employee. Similarly in Singlton v. Vance County Board of Education, 501 F. 2d 429 (4th Cir. 1974), the Fourth Circuit in deciding that a public employee could not sue a county board of education for unlawful dismissal under §1343, remanded with leave to amend presumably to assert jurisdiction under section 1331. The Seventh Circuit held in Hostrop v. Board of Jr. College, 523 F. 2d 569, 577 (7th Cir. 1975) that a municipal corporation was amenable to suit under section 1331 for a dismissal of a public employee in violation of his due process rights.

The district courts of several jurisdictions, including the southern district of New York, have also found that federal jurisdiction is sustainable under section 1331 for constitutional violations by municipalities or their agents. See Sanabria v. Village of Monticello, 424 F. Supp. 402 (S.D.N.Y. 1976); Barszcz v. Board of Trustees, 400 F. Supp. 675 (N.D. Ill, 1975); Patterson v. City of Chester, 389 F. Supp. 1093 (E.D. Pa, 1975); Wright v. Houston Indp. School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974) and Amen v. City of Dearborn, 363 F. Supp. 1267 (E.D. Mich. 1973).

See also Second Circuit Review, 1974-75 Term-Federal Jurisdiction, 42 Brooklyn Law Review 1097 (1976).

These various federal circuit courts and district courts were presumably, not persuaded that a Bivens remedy against municipalities would become a "bottomless font of tort law"[A-23] nor bring a flood of frivolous new claims into the federal courts. A plaintiff with a Bivens claim can already sue federally an individual officer under section 1983. Moreover, the amount in controversy requirement of $10,000 would further screen out frivolous claims. Various jurisdictions upholding Fourteenth Amendment claims against municipalities brought under section 1331 that have been cited above have opted for the historic function of the federal courts as guardians of constitutional rights as opposed to the risk of crowded dockets. See 89 Harv. L. Rev., Supra, at 952-60.

## CONCLUSION

THE O[illegible]ER APPEALED FROM SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS

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STATE OF NEW YORK )
COUNTY OF NEW YORK) ss.

Murray H Berman, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 311 W 97th St New York NY.

That on the 22nd day of AUGUST, 1977, deponent personally served the within BRIEF FOR PLAINTIFFS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

W. BERNARD RICHLAND
Corporation Counsel of the City of New York
Attorney for Defendants-Respondents
Municipal Building
New York, N. Y. 10007

Murray H Berman

Sworn to before me this

22nd day of AUGUST, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979